

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WILLIAM LEONARD PICKARD,

Plaintiff,

v.

DEPARTMENT OF JUSTICE,

Defendant.

Case No. [06-cv-00185-CRB](#) (NC)

**ORDER ON SUFFICIENCY OF
VAUGHN INDEX**

Re: Dkt. Nos. 207, 208

In this Freedom of Information Act case, plaintiff William Pickard seeks information from the federal government relating to confidential informant Gordon Todd Skinner. Because the government seeks to withhold the requested documents, it filed a 113-page Vaughn Index. Dkt. No. 166. Such an Index was supposed to identify each document withheld, as well as the statutory exemption claimed. This Index also should have provided a particularized explanation of how disclosing a specific document would damage the interest protected by the claimed exemption.

The District Court found the prior Index “supremely unhelpful,” and ordered the government to submit a new Vaughn Index to the undersigned magistrate judge for review. Dkt. No. 198 at 1, 8 (adding that the “declaration in support of the Vaughn Index is no better” at providing information about the documents’ contents and the exemptions that apply).

After reviewing the most recent Vaughn Index and the responsive documents, this Court finds that the Index—even when viewed in combination with the government’s supporting declaration—fails to sufficiently describe the withheld documents in adequate

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1 detail so as to allow Pickard to challenge the government's claimed exemptions. The
2 government also failed to identify what documents have already been released publicly,
3 which the District Court ordered it to do.

4 Accordingly, this Court orders the government to file a new Vaughn Index and
5 supporting declaration.

6 **I. BACKGROUND**

7 This case has been litigated for over 8 years, and its history is therefore substantial.
8 The Court focuses only on the limited background relevant to this Order.

9 Pickard seeks documents from the Drug Enforcement Agency pertaining to DEA
10 informant Gordon Todd Skinner. District Court Judge Breyer denied the government's
11 motion for summary judgment, which argued that all documents related to Skinner were
12 categorically exempt. Dkt. No. 198. Judge Breyer also denied Pickard's motion for
13 summary judgment, which argued that references to Skinner's name, Skinner's NADDIS
14 number, and information publicly disclosed by Skinner could not be exempt. *Id.* Judge
15 Breyer rejected that argument, finding that without a sufficiently detailed Vaughn Index,
16 the District Court could not determine the propriety of the claimed exemptions. *Id.*

17 Judge Breyer ordered the government to file a more detailed Vaughn Index and
18 supporting declaration, and to submit the withheld documents to the undersigned judge for
19 in camera review. *Id.*

20 **II. LEGAL STANDARD**

21 Ordinarily, in litigation, the discovery process gives each party access to the other
22 party's evidence. "In a FOIA case, however, because the issue is whether one party will
23 disclose documents to the other, only the party opposing disclosure will have access to all
24 the facts." *Wiener v. FBI*, 943 F.2d 972, 977 (9th Cir. Cal. 1991) (citations omitted).

25 "This lack of knowledge by the party seeking disclosure seriously distorts the traditional
26 adversary nature of our legal system[.]" *Id.* (quoting *Vaughn v. Rosen*, 484 F.2d 820, 824
27 (D.C. Cir. 1973)). By forcing the requesting party to rely on his opponent's
28 representations as to the undisclosed material, the "court is deprived of the benefit of

1 informed advocacy to draw its attention to the weaknesses in the withholding agency's
2 arguments." *Id.*

3 In light of this problem, "[g]overnment agencies seeking to withhold documents
4 requested under the FOIA are required to supply the opposing party with a Vaughn index
5 identifying each document withheld, the statutory exemption claimed, and a particularized
6 explanation of how disclosure of the particular document would damage the interest
7 protected by the claimed exemption." *Kucernak v. FBI*, 129 F.3d 126 (9th Cir. 1997)
8 (internal quotation marks and citation omitted). "*Specificity* is the defining requirement of
9 the Vaughn index." *Wiener v. FBI*, 943 F.2d at 979 (emphasis added). Thus, the index
10 must reveal "as much information as possible without thwarting the exemption's purpose."
11 *King v. DOJ*, 830 F.2d 210, 224 (D.C. Cir. 1987).

12 The purpose of the Vaughn Index is to "afford the FOIA requester a meaningful
13 opportunity to contest, and the district court an adequate foundation to review, the
14 soundness of the withholding." *Wiener*, 943 F.2d at 977 (quoting *King*, 830 F.2d at 218).
15 "The index thus functions to restore the adversary process to some extent, and to permit
16 more effective judicial review of the agency's decision." *Id.* at 978.

17 Notably, "[i]n camera review of the withheld documents by the court is not an
18 acceptable substitute for an adequate Vaughn index" because the Court's review "does not
19 permit effective advocacy." *Id.* at 979; *see also Martins v. U.S. Citizenship & Immigration*
20 *Servs.*, 962 F. Supp. 2d 1106, 1129 (N.D. Cal. 2013) ("In camera review may supplement
21 an adequate Vaughn index, but may not replace it.").

22 **III. DISCUSSION**

23 The Court has reviewed the government's most recent Vaughn Index and the
24 accompanying supporting declaration of attorney William Little, Jr. Dkt. No. 207. The
25 Court has also reviewed the withheld documents under seal in order to assess whether the
26 Vaughn Index and supporting declaration describe each withheld document with enough
27 detail so as to reveal "as much information as possible without thwarting the exemption's
28 purpose." *King*, 830 F.2d at 224.

1 This Vaughn Index was produced in response to an order by Judge Breyer.
 2 Specifically, Judge Breyer ordered the government to explain—in the Index itself or in a
 3 supporting declaration—three details: (1) “what information is in the documents”; (2)
 4 “whether that information has already been released publicly”; and (3) “what exemptions
 5 would apply that would overcome the presumption in favor of disclosure.” Dkt. No. 198 at
 6 9 (citing *United States Dep’t of State v. Ray*, 502 U.S. 164, 173 (U.S. 1991)).

7 Judge Breyer also criticized the government’s prior Vaughn Index as “conclusory
 8 and circular,” and “provid[ing] neither the Court nor the Plaintiff with any useful
 9 information about the content of the documents or how the claimed exemptions appl[ied].”
 10 Dkt. No. 198 at 8. To provide guidance as to the level of detail, Judge Breyer pointed to
 11 the *Wiener* case, which involved a university professor’s FOIA request concerning the
 12 FBI’s investigation of John Lennon. There, the Ninth Circuit explained how the
 13 government should have described a particular document in its Vaughn Index:

14
 15 Without violating the privacy interests of the informant or the
 16 third party, the FBI could have stated that HQ-8 recites
 17 information provided by a third party to an FBI informant
 18 detailing the third party’s knowledge of several activists and
 19 protest activities planned at the 1972 Republican National
 Convention, discussing the possibility that John Lennon would
 organize a series of concerts to raise money to finance the
 activity, and describing rivalries and jealousies within activist
 organizations.

20 *Wiener*, 943 F.2d at 984. Indeed, courts generally reject Vaughn Indexes when they
 21 provide “boilerplate explanations,” particularly those that are part of an agency’s “master
 22 response” that they use for several different FOIA requests. *Wiener*, 943 F.2d at 978; *see*
 23 *also Ctr. for Biological Diversity v. OMB*, No. 07-cv-04997 MHP, 2008 WL 5129417, at
 24 *7 (N.D. Cal. Dec. 4, 2008) (finding Vaughn Index inadequate where descriptions of
 25 documents were “replicated verbatim throughout the index”).

26 Here, the Vaughn Index and supporting declaration does describe in detail the titles
 27 of sections within the documents and the number of paragraphs that each section contains.
 28 *See, e.g.*, Dkt. No. 207 at ¶ 28 (“The *Drug Related Information* section contains 15

paragraphs that are number sequentially.”). But it uses the same boilerplate text to describe the contents of those paragraphs. For instance, a 15-paragraph section of an 8-page “Report of Investigation” is said to contain “information provided by a source that is related to several individuals and details their involvement in the illicit manufacturing and distribution of a controlled substance.” *Id.* The section actually describes information involving the moving of an LSD laboratory, money the DEA reportedly seized, and efforts by different individuals to exchange money from one currency to another. The government could have revealed this information in the Vaughn Index, without violating the privacy interests of any third parties or DEA agents. *See Wiener*, 943 F.2d at 979 (“Unless the agency discloses as much information as possible without thwarting the [claimed] exemption’s purpose, the adversarial process is unnecessarily compromised.”) (internal quotation marks and citation omitted).

Instead, the government uses identically broad language—“information provided by a source that is related to several individuals and details their involvement in the illicit manufacturing and distribution of a controlled substance”—to describe numerous documents. *See also, e.g.*, Dkt. No. 207 at ¶ 13 (stating that paragraph “memorialize[s] the source’s conduct and activities related to a criminal investigation of a third-party and contains details regarding the source.”). And nearly all of the documents in the supporting declaration end with the language:

Nothing in the report reflects any Government misconduct or DEA’s performance of its responsibilities. After withholding all exempt information, only incomprehensible words and phrases would remain and no useful information regarding any FOIA cognizable public interest. Thus, the report was withheld in its entirety pursuant to the Privacy Act, Exemption (j)(2), and the FOIA, Exemptions (b)(7)(C), (b)(7)(D), (b)(7)(E) and (b)(7)(F).

Dkt. No. 207; *see also Biological Diversity*, 2008 WL 5129417 at *7 (“Any documents that were of the same type would be given the same explanation for withholding.”). The Court acknowledges the government’s attempt to further describe the form of the

document. But by ending each document with the same language listing the same exemptions, just as in *Wiener*, the Court finds that the government made “no effort . . . to tailor the explanation to the specific document withheld.” *Wiener*, 943 F.2d at 978-79.

Put simply, by using boilerplate language throughout the declaration—both to describe the contents of the document and to describe what exemptions apply—the government failed to sufficiently describe the information in the documents, and provide a “particularized explanation” of how disclosure would damage the interest protected by the claimed exemption. *See Kucernak*, 129 F.3d at 126 (9th Cir. 1997) (citation omitted). Consequently, Pickard has not had a meaningful opportunity to challenge the Vaughn Index exemptions.

Additionally, the government failed to identify information in the documents that has already been released publicly. The most glaring example of this involves pages numbered 285 through 320 of a document that the declaration describes as “court dockets obtained from the Oklahoma State Court Network through the World Wide Web.” Dkt. No. 207-1 at ¶ 79. What the government described is already a public document, and was easily found on the World Wide Web by this Court. Moreover, the government fails to mention that the document concerns and contains Gordon Todd Skinner’s name, the very subject of Pickard’s FOIA request, and a known government informant. *See Wiener*, 943 F.2d at 979 (“Remarkably, in the original *Vaughn* index submitted by the FBI, John Lennon’s name does not appear at all.”); *Pickard v. DOJ*, 653 F.3d 782, 784 (9th Cir. 2011) (“We simply hold that since Skinner has already been officially identified as an informant by government counsel and agents, the cat is out of the bag”). Without a more tailored explanation beyond the boilerplate language identified above, the Court does not see how these pages, much less the document in its entirety should be withheld.

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IV. CONCLUSION

Because the government failed to follow the standard under *Wiener*, the Court finds that its most recent Vaughn Index—in combination with Little’s sixth declaration in support—is not sufficiently detailed. Therefore, the Court orders the government to submit an adequate Vaughn Index in accordance with this Order within 28 days.

Any party may appeal this non-dispositive order to Judge Breyer within 14 days. Fed. R. Civ. P. 72(a).

IT IS SO ORDERED.

Dated: February 19, 2015



NATHANAEL M. COUSINS
United States Magistrate Judge

United States District Court
Northern District of California